



**SO ORDERED.**

**SIGNED this 25 day of October, 2011.**

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**ROBERT E. NUGENT**  
**UNITED STATES CHIEF BANKRUPTCY JUDGE**

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

<b>IN RE:</b>	)	
	)	
<b>EARNED INCOME TAX CREDIT EXEMPTION</b>	)	<b>JOINTLY ADMINISTERED</b>
<b>CONSTITUTIONAL CHALLENGE CASES</b>	)	
<hr/>	)	
<b>LEA</b>	)	<b>No. 11-11131-7</b>
	)	<b>TRUSTEE NAZAR LEAD CASE</b>
	)	
<b>SCHMIDT</b>	)	<b>No. 11-11224-7</b>
<b>BUCY</b>	)	<b>No. 11-11489-7</b>
<b>TURNER</b>	)	<b>No. 11-11667-7</b>
<b>HUYNH</b>	)	<b>No. 11-11668-7</b>
<b>WILLIAMS</b>	)	<b>No. 11-11870-7</b>
<b>KILLMAN</b>	)	<b>No. 11-11871-7</b>
<b>MOORE</b>	)	<b>No. 11-11888-7</b>
<b>SUTTLES</b>	)	<b>No. 11-11891-7</b>
<b>BELL/BEHRENS</b>	)	<b>No. 11-11892-7</b>
<b>BUTLER</b>	)	<b>No. 11-12021-7</b>
<b>GARNES</b>	)	<b>No. 11-12034-7</b>
<b>VONLINTEL</b>	)	<b>No. 11-12103-7</b>
<b>NERIO</b>	)	<b>No. 11-12519-7</b>
<b>MELCHER</b>	)	<b>No. 11-12905-7</b>
<hr/>	)	

<b>SNYDER</b>	)	<b>NO. 11-11402-7</b>
	)	<b>TRUSTEE PARKS LEAD CASE</b>
	)	
<b>ARREOLA</b>	)	<b>NO. 11-11851-7</b>
<b>HERNDON</b>	)	<b>NO. 11-11875-7</b>
<b>MORRIS</b>	)	<b>NO. 11-11877-7</b>
<b>CIELO</b>	)	<b>NO. 11-11885-7</b>
<b>MIDDLETON</b>	)	<b>NO. 11-11886-7</b>
<b>SHEPHARD</b>	)	<b>NO. 11-11887-7</b>
<b>KINCADE</b>	)	<b>NO. 11-11839-7</b>
<b>PEACOCK</b>	)	<b>NO. 11-11840-7</b>
<b>MEDINA</b>	)	<b>NO. 11-12375-7</b>
<b>TAYLOR</b>	)	<b>NO. 11-12386-7</b>
<b>FIGUEROA</b>	)	<b>NO. 11-12387-7</b>
<b>NEEL</b>	)	<b>NO. 11-12398-7</b>
	)	

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**INITIAL CASE MANAGEMENT AND PROCEDURAL ORDER NO. 1**  
**GOVERNING JOINTLY ADMINISTERED**  
**EARNED INCOME TAX CREDIT EXEMPTION CASES**  
**(CHAPTER 7 TRUSTEES NAZAR AND PARKS CASES ONLY)**

The Court convened a pretrial scheduling conference in the above cases on October 20, 2011 at 11:00 a.m. and issues the following orders governing the future prosecution of the chapter 7 Trustees’ objections to the Debtors’ claimed exemption of the earned income tax credit under the recently enacted Kansas Senate Bill 12 (“Proc. Order No. 1”).<sup>1</sup> The appearances were as follows: Chapter 7 Trustees Edward J. Nazar and Linda S. Parks (and Rachel Avey); Derenda Mitchell of the Kansas Attorney General’s Office on behalf of the State of Kansas; and debtors’ counsel Martin Peck (*Lea, Suttles, and Bell/Behrens* cases); January Bailey (*Schmidt* case); Donald Astle (*Bucy, Snyder, Cielo, Middleton, Shephard, Moore* cases); Broc Whitehead (*Turner, Huynh, Killman,*

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<sup>1</sup> Senate Bill No. 12 was passed by the Kansas Legislature in the 2011 Legislative Session on April 7, 2011 and became effective April 15, 2011 upon its publication in the Kan. Reg. 2011, p. 434. *See also*, 2011 KAN. SESS. LAWS, ch. 25. In general, this statute grants an individual debtor in bankruptcy the right to exempt such debtor’s right to receive earned income tax credits pursuant to section 32 of the I.R.C. of 1986, as amended.

*Kincade, Peacock, Medina* cases); Susan Saidian (*Arreola* case), Sheila Maksimowicz (*Herndon, Taylor, Morris, Figuero* cases); Ross Wichman (*Von Lintel* case); Sarah Newell (*Nerio* case); Mark Lazzo (*Neel* case); and Abdul Arif (*Williams, Garnes, Butler, Melcher* cases) as counsel for their respective debtors.

**A. Background**

In each of the above captioned cases, the Debtors have exempted their right to receive an earned income tax credit (“EIC”) under § 32 of the Internal Revenue Code as provided by Senate Bill No. 12. The chapter 7 Trustees Nazar and Parks (collectively Trustees) objected to the claimed exemptions *inter alia*, asserting that S.B. 12 contravenes the Uniformity and Supremacy Clauses of the United States Constitution. In each case, the Trustees have filed a notice of constitutional challenge to the EIC exemption and the Court has certified the constitutional challenge to the Attorney General for the State of Kansas, all as provided by Fed. R. Civ. P. 5.1 as it applies to bankruptcy per Fed. R. Bankr. P. 9005.1. The Court finds that these objections to debtors’ claimed EIC exemption are contested matters under Fed. R. Bankr. P. 9014 and that Part VII of the Fed. R. Bankr. P. applies to these proceedings.

**B. Intervention by the State of Kansas in These and Future Like Cases**

*1. Captioned Cases*

In some but not all of these cases, the Attorney General seeks to intervene on behalf of the State of Kansas to defend the constitutionality of Senate Bill No. 12. In the remaining cases, the Attorney General has either not timely moved to intervene or the time to intervene has not yet expired.<sup>2</sup> At this hearing, the Assistant Attorney General announced the State’s intention to

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<sup>2</sup> Fed. R. Civ. P. 5.1(c).

intervene in each and every bankruptcy case where the constitutionality of the EIC exemption is challenged and orally moved to intervene in each of the above captioned cases. There being no objections, **the Court ORDERED that counsel for the Attorney General shall submit an agreed order within 14 days, signed by the case trustee and debtors' counsel, granting the Attorney General's motion to intervene in these proceedings.**

2. *Subsequent Cases*

If in subsequently filed bankruptcy cases these Trustees object to debtors' claimed EIC exemption and assert the same or a similar constitutional challenge, the Trustees shall continue to give notice of constitutional challenge to the Attorney General in accord with Fed. R. Civ. P. 5.1 on a case by case basis.<sup>3</sup> As they are filed, these notices shall be served upon the Office of the Attorney General via ECF and directed to Ms. Mitchell's attention. Upon receipt of the Trustees' notice, the Attorney General will not be required to file a separate motion to intervene in each case and set the matter for hearing.<sup>4</sup> Instead, the Attorney General may simply upload an Agreed Order Granting Intervention in the subsequently-filed case. **Such Agreed Orders shall be filed within 14 days of service of the Trustees' notice in the applicable Lead Case and Debtor's individual bankruptcy case.** Upon receipt of these Agreed Orders, the Clerk shall add the cases to the list of matters governed by this Proc. Order No. 1 and file this Proc. Order No. 1 in the new individual debtor's bankruptcy case, signifying that the new debtor's case will be jointly administered under

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<sup>3</sup> The Court will likewise continue to certify a constitutional challenge to the Kansas Attorney General as appropriate under Fed. R. Civ. P. 5.1. In order to activate Ms. Mitchell in the ECF system to receive notice via ECF, the Clerk's office shall manually add her as a party in each subsequent case upon the Trustees' filing of an objection and notice of constitutional challenge.

<sup>4</sup> In the event a party objects to intervention in a future case and declines to approve an Agreed Order, the Attorney General shall file a motion to intervene and set the same for hearing on the Court's regular monthly motion docket.

this Proc. Order No. 1.

**C. Joint Administration and Lead Cases**

The above-captioned cases are all the EIC exemption cases filed as of the date of this hearing where Trustee Parks and Trustee Nazar challenge the constitutionality of the state law exemption. The Trustees assert similar arguments. For ease of administering the volume of cases likely to entail a constitutional challenge to the EIC exemption and in the interest of judicial economy and the convenience of the parties, the above-captioned cases shall be procedurally consolidated for discovery, scheduling, briefing, and trial, and otherwise governed by this Order. Furthermore, Proc. Order No. 1 shall govern all future bankruptcy cases in which Trustee Parks or Trustee Nazar challenge the constitutionality of the EIC exemption.

The Court has selected one case in which Trustee Nazar is the chapter 7 trustee, *In re Lea*, No. 11-11131 and one case in which Trustee Parks is the chapter 7 trustee, *In re Snyder*, No. 11-11402 to be the Lead Cases on this controversy. Any related pleadings, notices, motions, final pretrial orders, dispositive motions, and any memoranda of law filed in connection with the Trustees' objections to the EIC exemptions claimed by Debtors in a case administered by Mr. Nazar shall be filed in *In re Lea* and similar papers filed in a like case administered by Ms. Parks shall be filed in *In re Snyder*. Debtors shall file any other papers dealing with issues other than the EIC exemption in their respective individual bankruptcy cases. In order to identify a pleading filed in the Lead Case by a Debtor other than the Lead Case debtor, the debtor should use the "interested party" party designation in CM/ECF when filing pleadings in the case and should utilize the sample form of case caption attached hereto.

**D. Interim Orders: Tax Returns and Refunds**

*1. Determining the Existence of a Case or Controversy.*

Because the income tax benefits that these debtors have claimed exempt will not be determined or become available to them until the close of the 2011 tax year, the Court is unable to determine presently whether the Trustees' objections to the exemptions present an actual case or controversy. It is therefore necessary to establish interim provisions for the determination of, and disposition of such benefits, if any, pending the entry of a final order in these cases. First, in order to promptly determine whether each particular set of Debtors are eligible for the claimed EIC exemption and, if they are, to what the extent their tax refunds reflect the EIC, **Debtors SHALL file their 2011 Federal and State Income Tax Returns on or before March 1, 2012 and serve a copy of the same on the chapter 7 Trustee. If, based upon the filed return, Debtors are entitled to a refund stemming in whole or in part from the EIC, the Debtors shall deposit the bankruptcy estate's share of any refund received in their attorney's trust account, as calculated by the Trustee, pending the entry of a final order on the Trustee's objection to the EIC exemption. In no event shall the Debtors spend, transfer, or distribute the estate's claimed share of the refund during the pendency of these proceedings.**

*2. Calculation of the Estate's Share of the Refund*

The Trustee's calculation of the estate's share of any tax refund shall be based upon a fraction, the numerator of which shall be the number of days of the calendar year 2011 that had elapsed prior to the date of the petition and the denominator of which shall be 365.<sup>5</sup> This allocation shall be presumed valid on an interim basis. If any party disputes the presumptive allocation amounts, that party shall file an appropriate motion, setting the matter for hearing on the

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<sup>5</sup> See *In re Barowsky*, 946 F.2d 1516 (10th Cir. 1991).

miscellaneous chapter 7 docket in accordance with this Court's motion docket instructions. Until the dispute is resolved either among the parties or by the Court, the estate's presumptive share of any refund as calculated by the Trustee shall remain in the debtor's attorney's trust account pending the Court's further order.

3. *If There Is No Refund*

If upon preparation and filing of Debtors' 2011 tax return, the Debtor concludes that he or she is not eligible for the EIC or will receive no refund, **Debtor shall amend Schedule C in his or her individual bankruptcy case accordingly on or before March 16, 2012 and the Trustee shall thereafter withdraw his or her objection to the previously claimed EIC exemption as moot. Any such Debtor shall also file in the Lead Case a Notice and Request to Remove Bankruptcy Case from these jointly administered cases.**

E. **Discovery and Scheduling Order**

The Court establishes the following pretrial schedule and deadlines in these jointly administered EIC cases.

1. *General Discovery and Disclosure Deadlines.*

All Discovery shall be commenced in time to be completed by **June 15, 2012**. Because the legal issue is well-defined and the Court has conducted this pretrial conference, the Court dispenses with the Rule 26(f) discovery planning conference process, except for the initial disclosures required by Rule 26(a)(1). All parties shall provide their Rule 26(a)(1) initial disclosures no later than **December 5, 2012**. In subsequently filed cases in which the EIC exemption constitutional challenge is raised, **the new debtor party shall provide their Rule 26(a)(1) initial disclosures within 14 days of entry of the Agreed Order granting the Attorney General's intervention.**

2. *Experts*

The parties shall designate their expert witnesses, if any, by **April 1, 2012 and shall furnish their written expert report to the opposing parties no later than May 1, 2012.**

3. *Pretrial Order Procedure; Dispositive Motions; Stipulations and Briefing Alternative*

a. The parties shall submit an Agreed Final Pretrial Conference Order in each Lead Case by **July 15, 2012.** The Trustee shall take the lead in preparing the Final Pretrial Order. The Final Pretrial Order shall be approved and signed by the applicable Trustee, the Attorney General, and all debtors' counsel in the bankruptcy cases associated with the Lead Case. In lieu of obtaining approvals from each debtors' lawyer, the Trustees may submit the Orders under D. Kan. L.B.R. 9074.1.

b. Dispositive motions, if any, are due **August 1, 2012. D. Kan. L.B.R. 9013.1 shall apply to briefs and memoranda.** Briefs shall be filed by the Trustee, Debtors, and Attorney General in the applicable Lead Case.

c. If the parties are able to stipulate to the controlling facts and submit the matter to the Court on stipulations and briefs, the stipulations shall be due **July 16, 2012. The Trustees opening brief shall be due August 6, 2012 (21 days). The Attorney General's and the Debtors' response briefs shall be due August 21, 2012 (14 days). The Trustees' reply brief shall be due September 4, 2012 (14 days). D. Kan. L.B.R. 9013.1 shall apply to briefs and memoranda.** Briefs shall be filed in the applicable Lead Case.

6. **These matters shall be ready for trial by August 1, 2012.** An evidentiary hearing or trial, if required, shall be scheduled by the Court and a notice of trial setting will be issued to the parties by the Court as its trial calendar permits.



7. The Court may schedule such further status or pretrial conferences upon motion of a party or as the Court may require.

8. The Court will schedule a Final Pretrial Conference in advance of the trial setting.

9. The parties are permitted and encouraged to commence discovery now to the extent they are able to do so and to secure expert witnesses, if necessary. The Court views the likely factual disputes as determining whether a certain debtor is entitled to the EIC and if so, in what amount. These are relatively simple issues and, for that reason, fact discovery should be relatively straightforward. Because these Debtors' circumstances may require the most prompt determination possible of their exemption's validity, the Court will not be inclined to grant extensions of the discovery deadlines in the absence of a compelling showing of cause.

**F. Miscellaneous Orders**

*1. Subsequently Filed Cases*

Unless otherwise ordered, all future bankruptcy cases in the U.S. Bankruptcy Court, District of Kansas, Wichita Division, in which Trustees Nazar or Parks object to the debtors' claimed EIC exemption on constitutional grounds shall be governed by this Order. **Upon the filing of the Agreed Order as referenced in Section B.2. herein, the Clerk shall docket a copy of this Proc. Order No. 1 in the subsequently filed individual debtors' bankruptcy case to effectuate notice and service of this Order on debtors' attorney, if debtor is represented, and on the debtor, if unrepresented.** Such newly filed cases will be subject to joint administration with those captioned above and debtors therein will be subject to the terms of this Order, except as the Court may order otherwise.

*2. Cases Not Subject to this Order*

In other bankruptcy cases filed in the Wichita Division of the Kansas Bankruptcy Court wherein a Trustee *other* than Trustees Nazar or Parks is appointed interim trustee, the debtor claims the EIC exemption, and the trustee challenges it on constitutional grounds, this Order shall not apply. Upon the presentation of such cases to the Court, the Court will convene a status conference and issue a separate Case Management and Procedural Order governing those cases.

3. *Compliance with this Order*

Failure to comply with this Order may result in the exclusion of evidence, dismissal of a case, striking of pleadings, assessments of costs and attorney fees, or other appropriate action or sanction under the Federal Rules of Civil and Bankruptcy Procedure and/or § 105(a).

4. *Modification of this Order*

This Order shall govern all further pretrial proceedings in the EIC exemption constitutional challenge cases in which Trustees Nazar or Parks are the assigned case Trustees, unless and except as modified by the Court *sua sponte* or for good cause shown.

5. *Service of this Order*

The Clerk shall forthwith serve a copy of this Order on the Assistant Attorney General, Trustee Nazar, Trustee Parks, and each attorney for the Debtors. The Clerk is further directed to docket this Order in each of the Lead Cases as well as each of the individual debtors' bankruptcy cases.

6. *Court Website*

The Clerk shall post this Proc. Order No. 1 to the Court's website, [www.ksb.uscourts.gov](http://www.ksb.uscourts.gov), under the link "Wichita Earned Income Credit Exemption Cases," together with other helpful information pertaining to joint administration of these objections. Further, a copy of this Order shall

be transmitted to the Bankruptcy List-serve and be made available in paper form at the counter of the Clerk's Office in Wichita upon request.

**IT IS SO ORDERED.**

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**SAMPLE FORM**

**CASE CAPTION FOR DEBTOR  
WHO IS NOT THE LEAD CASE**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
EARNED INCOME TAX CREDIT EXEMPTION	)	Jointly Administered
CONSTITUTIONAL CHALLENGE CASES	)	
_____	)	
	)	
IN RE:	)	No. 11-11131-7
	)	Trustee Nazar Lead Case
LEA,	)	
	)	
Debtor	)	
_____	)	
	)	
IN RE:	)	
	)	No. 11-11871
KILLMAN,	)	
	)	
Debtor	)	
_____	)	

MOTION